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Supreme Court of the United States

OCTOBER TERM, 1980

Nos. 80-1937, 1938, 1939

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT LONG ISLAND LIGHTING COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Long Island Lighting Company (LILCO)* hereby responds to the petitions for writs of certiorari submitted on behalf of the Federal Energy Regulatory Commission (No. 80-1937), and by North Carolina Utilities Commission (No. 80-1938) and North Carolina Natural Gas Corporation, *et al.* (No. 80-1939) [hereinafter referred to as "Petitioners"].

REASONS FOR DENYING THE PETITION

1. The Petitioners for a writ of certiorari claim that the decision of the court below raises an important question insofar as it holds that the Commission can change a settled method of designing rates only if it complies with the requirements of Section 5 of the Natural Gas Act. They claim that complying with the requirements of Section 5 will severely limit the Commission's power to eliminate discrimination. We disagree. We do not believe it will have any significant impact on how the Commission conducts its affairs.

The only effect of the decision is to require the Commission to make a finding based on substantial evidence in the record that the existing method of designing rates is unjust and unreasonable. That requirement will not prevent the Commission from eliminating discrimination. If an existing method of designing rates in fact results in discriminatory rates, then the parties that are being discriminated against or the Commission, through its staff, should be able to present the evidence that would support such a determination.

Moreover, it would seem that evidence sufficient to support a determination that the new method that the Commission wishes to implement is just and reasonable would also be sufficient to also

*LILCO has subsidiaries (other than wholly-owned subsidiaries) Honeoye Storage Corporation and Boundary Gas, Inc.

support a determination that the existing method is not just and reasonable. As we see it, the additional burden placed on the Commission by the decision below is simply to declare what would otherwise be implied but often goes unsaid. And if the decision prevents the Commission from doing what it believes is appropriate, it is simply because the Commission may find it difficult to declare that an existing method of designing rates for some reason or another now produces an unlawful result even though that method has been settled practice on the pipeline for several years and has been accepted by the Commission as an essential element in settlement of numerous rate cases. Understandably, the Commission would rather not have to make such a declaration; and perhaps in some such cases, it may hesitate to do so and as a consequence may retain the existing method. But if that occurs, it is only because the Commission is forced to admit that it has no good reason to make the change, and this Court should hardly be concerned about that.

The decision of the court below, insofar as it held that any change in a method of designing rates can be made only prospectively, would seem in theory to be important. It is not, however, very important in practice. Moreover, it is good policy.

The Petitioners rely on the decision of this Court in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), wherein this Court said that the Commission could make such changes retroactively. The issue there, however, was not whether the Commission could do it, but rather whether it was appropriate for the Commission to issue an order that would make it impossible for the pipeline to recover its cost of service if the Commission should later require it to implement a change in rate design retroactively. All parties in *Tennessee* assumed that the Commission could make a change retroactively under Section 4. Consequently, the Court did not hold it. More to the point here, the case suggests,

as is often the case, that the Commission is more concerned about getting the overall level of rates down as quickly as possible before it decides how the pipeline's system costs will be shared by its customers. *Tennessee* is consistent with the practice that is often followed by the Commission: cost of service issues are settled as quickly as possible and changes in rate design are implemented prospectively from the date of the decision.

We believe the Court's interpretation of the statute is permitted by the language of the statute. It is clear that it is consistent with the public interest. The court below said that placing the burden on the pipeline would be unfair to the pipeline. We agree with that, but we think it is more important to note that if the Commission had the power to implement changes retroactively and actually exercised that power, the pipelines would be forced to protect themselves against all conceivable rate designs by filing very high rates, which would lead to large refunds and thereby a shifting of the burden of future costs from future customers who get the refunds to present customers who would pay the high filed rates. Since the Commission rarely, if ever, exercises the power that the Petitioners claim it has, the decision of the court below, insofar as it eliminates retroactivity, will not have any practical significance other than to eliminate the requirement that the Commission explain and then defend as it did here at the insistence of the Petitioners from North Carolina why it has decided to implement the change only prospectively. In short, the Commission is probably better off without the power to implement changes in rate design retroactively.

2. The Petitioners contend that even if the rule established by the court below were correct when applied to past decisions made on the record after a full hearing, it is incorrect to apply it to methods of designing rates incorporated in settlements that are merely accepted by the Commission. The contention is specious.

There is no basis in law for a distinction between methods incorporated in settlements and methods adopted by the Commission after a full hearing. The law says that the pipelines must charge just and reasonable rates and the Commission has no authority to accept a settlement of a rate case that will result in charging anyone rates that are not just and reasonable. The contention of the Petitioners is based on the premise that the Commission actually accepts methods of designing rates incorporated in settlements that are not just and reasonable simply to relieve itself of its workload. The Commission has no authority to do any such thing; and, consequently, there is no reason to establish the requested distinction in order to permit the Commission to do it.

The Commission does not, in fact, accept unjust and unreasonable methods of allocating costs in order to relieve itself of its workload. The Petitioners' contention reflects the pretense that there is a right way to allocate costs that will produce nondiscriminatory rates and the right way is the way the Commission prefers to do it. But there is no right way to design rates by allocating fixed costs. It is not simply that the right way cannot be applied precisely, but rather that there is no way that is right in theory. Moreover, until the Commission speaks, it is impossible to know what it prefers. There are many different ways of allocating costs, which is why the issue is litigated and also why the issue can be settled and why when the Commission approves a settlement it is not adopting an unjust method but simply one of the many possibilities that are within the range of methods that it might determine produce just and reasonable rates.

The Petitioners claim that the decision of the court below will inhibit the settlement process. We think that the contention is totally irrelevant to whether settlements should be treated like decisions on the record and wrong in any event. We do not think

the decision will have any impact on the process.

One can imagine all sorts of reasons why the decision below will make the calculations of parties considering settlements somewhat different, but it is impossible to determine, *a priori*, whether those calculations will be more or less complicated or whether the process will be inhibited or enhanced. It does seem, however, that if the law gave Section 5 protection to methods of designing rates adopted by the Commission after a full hearing and did not give that protection to methods incorporated in settlements, there would be more litigation, not less. If the law made that distinction, a party would want to litigate cases for no other reason than to get Section 5 protection against the whims of future Commissions.

3. Although we do not believe that the decision of the court below, insofar as it held that the Commission can change an existing method of designing rates only pursuant to Section 5, will have any material impact on the Commission's powers and, therefore, does not raise an important question, we do not mean to suggest that we do not think the decision was significant. As we see it, the essential holding of the court below was that the Commission cannot change an existing method of designing rates without explaining in a manner that is decipherable by the courts how what it has decided to do will achieve its stated objective. The court applied the rule it had established in *Columbia Gas Transmission Corp.* v. *FERC*, 628 F. 2d 578 (D.C. Cir. 1979) wherein it said that the Commission cannot change an established method of designing rates simply by saying that in its judgment the result achieved by the change will be appropriate. Reasoned decision-making requires that the Commission explain what it is doing.

It is important to note that neither the Commission nor anyone else sought review of the decision of the court in *Columbia* and

none of the Petitioners here are seeking review of the decision below insofar as it relied on *Columbia*. It is also important to note that the decision in *Columbia* assumed that the Commission did have the power to change a rate design pursuant to Section 4 provided that it engage in reasoned decisionmaking. Therefore, even if this Court takes this case and reverses the court below with regard to its Section 5 pronouncements, the essential finding of the court below would remain undisturbed.

The Petitioners do contend that the rule of *Columbia*, although correct when applied to decisions on the record, should not be applied to methods incorporated in settlements. But again, there is no basis in law for making a distinction between decisions on the merits after a hearing and acceptance of settlements, regardless of whether the question is to give the former but not the latter the protection of Section 5 or merely sound reasoning. Consequently, in our judgment, their contention does not raise an important question that deserves a hearing before this Court. Moreover, it is hard to understand the Commission's complaint. If an existing method of designing rates reflects mere numbers and not the cost of service, it should be a rather simple task to explain how some other method better reflects the cost of service. Neither Section 5 nor sound reasoning will create an impediment to any such change and neither did so in this case. The Commission's problem here is due to the fact that it merely switched from one method that reflects numbers to another method that reflects some other combination of numbers, and it did not and could not explain to the court that it was doing anything else.

4. The Petitioners other than the Commission contend that the court should have remanded the case to the Commission so that the Commission could reconsider the issue in light of the court's

decision. We disagree. The court held that the Commission not only did not make the findings required by Section 5, but also that it did not comply with the requirements of *Columbia*. If the court below had only determined the former, a remand might be appropriate; but since it also determined the latter, a remand under the circumstances of this case would be a waste of time. The court below held that the Commission has not explained how mcf-mile results in rates that better reflect the cost of service; and since the Commission has been given every opportunity to explain it, its failure to do so implies that mcf-mile is inexplicable. Consequently, remanding the matter to the Commission will serve no purpose other than to give the Commission another opportunity to indulge in more of the same type of "conclusory" reasoning that went into Opinion 59.

It is significant that the Commission does not make this contention. It apparently recognizes the futility of trying to justify the change to mcf-mile in a manner that will satisfy the rule of *Columbia*. But that implies that it recognizes that it in fact has no good reason to make the change. And that in turn implies that this Court has no good reason to take this case.

5. The Petitioners argue that the decision of the court below will effectively establish *de facto* trial *de novo* in the Courts of Appeals with far less assurance of informed and expert judgments. We disagree. The decision only means that the Commission must engage in reasoned decisionmaking. Although ratemaking may be a legislative function, it does not have to be a political act. It is sound policy to delegate that task to an administrative agency and not just presume but require that that agency apply some amount of expertise to the issues presented to it. Part of being an expert is to be able to explain what one is doing in a manner that is intelligible to reasonably intelligent people; and as the court said in *Columbia*, if the Commission cannot explain

what it is doing in a manner intelligible to the courts, there are probably gross flaws in its reasoning. Only if the courts insist on intelligible explanations can society have any assurance whatsoever that expert judgment is, in fact, being applied to the task of designing rates for the interstate pipelines. The decisions of the court below in *Columbia* and this case are important because they will help provide that assurance. By issuing the requested writ and then reversing, this Court can only destroy that assurance.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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